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that "the accused had ample opportunities of knowing that their presence in the Court was required for a particular object: they had also been at the High Court to witness how the case was being disposed of by Mr. Justice Straight, *i. e.*, they were fully aware of the order that the High Court had passed in the case." On this finding I could not say that the petitioners had been prejudiced in their defence to the summons by the procedure of the Magistrate now made the subject of complaint. Moreover, their witnesses were examined. The *nature* of the proceedings under chapter XXXVII of the Code of Criminal Procedure is judicial. There must be an adjudication on evidence, and as the provisions of s. 283 are applicable to cases of revision as well as appeal I would say that the objections taken by Mr. Dillon for the petitioners fail. I observe that s. 489 is cited, probably by some accidental error, in the petition of the 10th September by Mr. Dillon. It is not really contended that the Magistrate had acted under s. 489; s. 491 is clearly meant. I would dismiss the application for the reasons given above.

OLDFIELD, J.—In my opinion, the application should be dismissed. The Magistrate's proceedings were taken under the direction of this Court acting within its power under s. 297 of the Code of Criminal Procedure. There is no force in the second ground of objection.

STRAIGHT, J.—Having regard to the circumstance that an order of my own is the subject of this reference for revision, I think it best to abstain from taking part in the judgment of the Full Bench.

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March 9.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

AZIM-UD-DIN (DEFENDANT) *v.* BALDEO (PLAINTIFF).*

Suit to have an execution-sale, which had been set aside, confirmed—Act X of 1877 (Civil Procedure Code), ss. 311, 312, 588—*Finality of order setting aside sale.*

Held (OLDFIELD, J., dissenting) that a suit by the purchaser at a sale of immoveable property in execution of a decree, which has been set aside under ss. 311 and

* Appeal under s. 10 of the Letters Patent, No. 4 of 1880.

312 of Act X. of 1877, to have such sale confirmed, on the ground that there was no irregularity in the publication or conduct thereof, is not barred by the last clause of s. 312 or by the last clause of s. 588, but is maintainable.

THIS was a suit to have an execution-sale, which had been set aside, maintained. Certain immoveable property was put up for sale in execution of a decree, and was purchased by the plaintiff in this suit, the son of the decree-holder. The judgment-debtor preferred objections to the sale on the ground that the sale had not taken place at the hour fixed; that consequently intending purchasers did not assemble, and only a few persons, who were dependents of the decree-holder, were present; and that consequently the property was sold for an inadequate price, and he was thereby materially injured. The Court executing the decree disallowed these objections. On appeal by the judgment-debtor the appellate Court set aside the sale on the ground that it was stated in the sale-notification that the sale would take place at 12 o'clock noon; that admittedly the sale took place at or after 2 P.M.; that the fact of the sale having taken place two hours or so after the time fixed was a material irregularity in its conduct; and that by reason of such irregularity the judgment-debtor had sustained substantial injury, the property having fetched an inadequate price. The plaintiff, the auction-purchaser, brought the present suit against the judgment-debtor to have the sale maintained, on the ground that there was no irregularity in its conduct; and therefore the order setting it aside was contrary to law. The defendant set up as a defence that the suit was not maintainable. Both the lower Courts held that a suit to have an execution-sale, which had been set aside, confirmed, on the ground that it had been improperly set aside, was maintainable; and that the order setting aside the sale in this case was not in accordance with the provisions of s. 312 of Act X of 1877, there having been no irregularity in the conduct of the sale, and, if there had been any such irregularity, the judgment-debtor had not sustained injury by reason thereof; and gave the plaintiff a decree. On second appeal by the defendant it was contended on his behalf that the order setting aside the sale was final, and no suit to set aside such an order could be maintained by the party affected thereby. The appeal came for hearing before Pearson, J., and Oldfield, J., who differed

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in opinion on the point whether the suit was maintainable. Those learned Judges delivered the following judgments:—

PEARSON, J.—The last clause of s. 312 of Act X of 1877 declares that "no suit to set aside, on the ground of irregularity, an order passed under this section shall be brought by the party against whom such order has been made." The irregularity referred to is that spoken of in the preceding section, *viz.*, a material irregularity in publishing or conducting a sale. The present suit is not a suit to set aside, on the ground of such irregularity, an order passed under s. 312, and is not, therefore, in my opinion, barred by the terms of the last clause thereof. The last clause of s. 588 of the same Act declares that "the orders passed in appeal under this section shall be final." The chapter in which that section occurs treats of appeals from orders, and it appears to me to be the obvious meaning of the last clause above cited that the orders specified in the section shall be the subject of a single appeal only, and that the orders passed in appeal shall be final in the sense that they shall not be the subjects of a second appeal. The present suit is not, in my opinion, barred by the last clause of s. 588 of the Code. Accordingly, I would dismiss the appeal with costs.

OLDFIELD, J.—The plaintiff is auction-purchaser at an execution-sale. An application was preferred by the judgment-debtor under s. 311 of Act X of 1877, asking the Court to set aside the sale, on the ground of material irregularity in conducting the sale. The first Court disallowed the objection and confirmed the sale. On appeal the appellate Court allowed the objection and set aside the sale. The plaintiff, auction-purchaser, has brought this suit to have the sale maintained. It appears to me that the suit is not maintainable with reference to the last clause of s. 588 of Act X of 1877, which is as follows:—"The orders passed in appeal under this section shall be final." I consider this clause does not refer to finality so far only that no second appeal is allowed, but to render the order final for all purposes and to preclude a suit. The old law of s. 257 of Act VIII of 1859 allowed neither appeal nor suit for an order setting aside a sale, and while allowing an appeal from an order confirming a sale allowed no suit. The words of this part of the section were:—"If the objection be allowed, the

order made to set aside the sale shall be final; if the objection be disallowed, the order confirming the sale shall be open to appeal, and such order unless appealed from, and if appealed from, then the order passed on the appeal, shall be final, and the party against whom the same has been given shall be precluded from bringing a suit for establishing his claim." The meaning of the term "final" under that law was fully discussed by the Full Bench of the Calcutta Court in *Kooldeep Narain Singh* v. *Luckhun Singh* (1). Peacock, C. J., remarked :—"If the objection be allowed, the order made to set aside the sale is final; that, as I understand it, means final for all purposes. This would cause no great hardship, for, if the objection were allowed, the only person likely to be affected by setting aside the sale would be the purchaser at the sale. But he could not be greatly injured, for when a sale is set aside the purchaser is entitled by s. 258 to receive back his purchase-money with or without interest." In s. 588 of Act X of 1877, the same words "the order shall be final" occur, and I can only suppose that they are used in the same sense that attached to them in the old law, which is their natural sense, final being final for all purposes. Had it been intended to allow a suit to contest the order, it is presumable that the Legislature would have given a specific direction to that effect, as it has in other parts of the Code (ss. 332, 335), for as Sir Barnes Peacock pointed out in the judgment cited Courts of Justice have, generally speaking, the sole control over the execution of their process. I would allow the appeal and reverse the decree of the lower Court and dismiss the suit with costs.

The defendant appealed to the Full Court from the judgment of Pearson, J., under s. 10 of the Letters Patent.

Munshi *Hanuman Prasad* and Pandit *Nand Lal*, for the appellant.

Babu *Oprokash Chandar Mukarji*, for the respondent.

The following judgments were delivered by the Full Court:

STUART, C.J.—I agree with Mr. Justice Pearson. When Sir Barnes Peacock said, in the case referred to by Mr. Justice

(1) 9 W. R., 218; S. C., B. L. R., F. B. R., 917.

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Oldfield, that "if the objection be allowed the order made to set aside the sale is final, that is, as I understand it, final for all purposes," he must be understood to have meant "final for all purposes" *as an order*. If he meant anything more, and that a suit would not lie, he was in my opinion clearly wrong. The question before us to my mind does not admit of the least doubt or difficulty, and I would dismiss the appeal and affirm the judgment of the Division Bench with costs.

PEARSON, J.—I adhere to my judgment which is impugned by this appeal; and can only express my surprise that it should be impugned by an argument which is not seriously maintainable. The present suit not being one of the nature described in the last clause of s. 312 of Act X of 1877, its provision cannot apply to it. On the ground on which it is brought, the appeal manifestly fails. The contention that the suit was barred by the concluding clause of s. 588 of the Act was more plausible, as the authority of Sir Barnes Peacock supports the view that the word "final," as used in that clause, means final for all purposes and precludes not only a second appeal but a fresh suit. The word "final," as used in that clause, has doubtless the same meaning as the same word used in s. 257 of Act VIII of 1859, which Sir Barnes Peacock was construing in the judgment to which reference was made by my learned colleague Mr. Justice Oldfield, in disposing of the present case on the 8th June last, but such a construction of the word appears to be negatived by the concluding terms of s. 257 itself. Had the word "final" been used in such a sense in the preceding part of that section, it would have been unnecessary, it would have been mere surplusage and repetition, to add that the "party against whom the same (order) has been given shall be precluded from bringing a suit for establishing his claim."

SPANKIE, J.—The decree-holder, or any person whose immoveable property has been sold under the chapter in which s. 311 is found, and no other person, under that section may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it. If no such application as is mentioned in s. 311 be made, or if such application be made and the objection be disallowed, the Court shall pass an order confirming

the sale as regards the parties to the suit and the purchaser. If such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale. But no suit to set aside, on the ground of such irregularity, an order passed under this section (312) shall be brought by the party against whom such order has been made. It appears then that the auction-purchaser cannot make an application under s. 311, but if an application is made by the decree-holder, or the person whose immoveable property has been sold under the chapter, and if the sale is confirmed, it is confirmed as regards the parties to the suit and the purchaser. It further appears that, if the sale be confirmed or be set aside, no suit can be brought on the ground of such irregularity to set aside an order passed under the section by the party against whom the order has been made. It would seem then that no auction purchaser, who brings a suit to maintain a sale on the ground that there was no material irregularity in publishing or conducting the same, can be said to be debarred from doing so by the concluding paragraph of s. 312, and this I propose presently to establish. But though an auction-purchaser cannot himself be the person who makes an application under s. 311, and though the sale may be confirmed as regards himself and the parties to the suit, he may claim to have notice served upon him and to be made a party, when an application has been made to cancel a sale on the ground of irregularity. There is an appeal allowed by cl. (16), s. 588, from an order confirming the sale, though there is none from an order setting aside the sale. The auction-purchaser may claim, if he has been heard when the application was disposed of, to be a respondent in the appeal, as he is interested in maintaining the confirmation of the sale. The orders passed in appeal under s. 312 are final, so far that no further appeal is permitted from the order made. In another sense the order may be said to be final, and that is in respect of the application under s. 311. For the applicant under that section comes into Court for the sole purpose of setting aside the sale on the ground of material irregularity. Such a *suit*, however, has already been barred by s. 312, and it is not easy to understand that it was intended by the closing words of s. 588 to repeat the prohibition. If the sale be confirmed, and the decree-holder and judgment-debtor are agreed, there is no object in the alleged

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finality of s. 588 for all purposes. In so far as the auction-purchaser is concerned, he cannot be an applicant under s. 311, and if brought into the proceeding as a party, it is that he may defend his purchase. If the sale be confirmed, he has no motive or ground to maintain it. He equally with the decree-holder and judgment-debtor is precluded by s. 312 from a suit to set aside by a regular suit, on the ground of material irregularity, a sale confirmed by the order of a Court executing a decree. The decision to which my honourable colleague Mr. Justice Oldfield refers was passed on a question whether or not there was a special appeal from an order passed in appeal under s. 257 of Act VIII of 1859. No doubt the learned Chief Justice intimated his opinion that the order to set aside a sale is final for all purposes. But the wording of s. 257 of Act VIII of 1859 and the wording of s. 312 of Act X of 1877 are not identical. In the one Act, the passage runs as follows :—"If the objection be allowed, the order made to set aside the sale shall be final; if the objection be disallowed, the order confirming the sale shall be open to appeal, and such order unless appealed from, and if appealed from, then the order passed on the appeal, shall be final, and the party against whom the same has been made shall be precluded from bringing a suit to establish his claim." The result of this was that a party desirous of bringing a suit to confirm a sale, in consequence of an order in appeal setting it aside, was strictly precluded from doing so by the words of the section. No suit could be brought by the party against whom an order was passed to establish his claim whatever it might be, and in the case of an auction-purchaser it would be a claim to maintain the sale in his favour on the ground that there had been no material irregularity in publishing or conducting it. But the words of s. 312 are different :—"If such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale." It is not said, as it was in s. 257 of Act VIII of 1859, that "if the objection be allowed, the order made to set aside the sale shall be final." But it is added that "no suit to set aside, on the ground of such irregularity, an order passed under this section shall be brought by the party against whom such order has been made." As we have seen, there is only an appeal from an order confirming the sale. If the appeal be disallowed, it is dismissed and the sale confirmed. If the appeal be decreed, the

sale is set aside upon the ground that there was a material irregularity in the publishing or conducting it. From this order there is no appeal, but an order by the Court executing the decree and setting aside the sale on this ground has not been declared final by s. 312. Thus there is nothing to preclude a person from coming into Court to confirm a sale on the ground that there was no irregularity, though not to sue to set aside an order of confirmation, passed in appeal, on the ground that there was material irregularity in the publishing or conducting the sale. Any claim in a suit was barred by s. 257 of Act VIII of 1859. The suit to set aside a sale, when confirmed, on the ground of material irregularity in publishing and conducting it alone is barred by s. 312. Under the old Act the order passed had the effect of a decree because all recourse to a regular suit was barred. Under the new Act the order has the effect of a decree in so far only as the prohibition to sue is limited. But in respect of any other claim not so limited the order under s. 312 has not the effect of a *decree* as defined now by s. 2 of the Code, which expressly declares that an order under s. 588 is *not* a decree. Thus though an order under s. 588 is not open to further appeal, and is so far final, it is not final for all purposes, as it is not a decree in respect of the matter now complained of. For these reasons I would support Mr. Justice Pearson's judgment.

OLDFIELD, J.—I have little to add to the remarks in my judgment dated 8th June last. The last paragraph of s. 588, Civil Procedure Code, to the effect that "the orders passed in appeal under this section shall be final" appears to me to bar a suit, the word "final" meaning final for all purposes. Under any circumstances I should hesitate to hold that a suit is maintainable by an auction-purchaser to have a sale confirmed which has been set aside by the Court executing the decree, for irregularities in publishing or conducting the sale, under s. 312, Civil Procedure Code, unless it could be shown that the law expressly allows such a suit. Civil Courts have jurisdiction to try all suits of a civil nature, but this jurisdiction is by s. 11, Civil Procedure Code, made subject to the provisions of the Code, one of which is that the Court to which the decree is sent for execution shall alone execute the decree (s. 223); and it

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would be an interference with the execution of the decree to allow an auction-purchaser to bring a suit to contest the order of the Court executing the decree for setting aside or refusing to confirm a sale, when the order is made under the provisions of ss. 311, 312, Civil Procedure Code. The observations of the Chief Justice, Sir Barnes Peacock, in *Kooldeep Narain Singh* v. *Luckhun Singh* (1), referring to s. 257 of Act VIII of 1859, appear to me so pertinent that I give them at length:—"S. 257 relates to applications for setting aside a sale under an execution, on the ground of some material irregularity in publishing or conducting the sale. Generally speaking, Courts of Justice have the sole control over the execution of their own process, and if any irregularity is committed in the execution of their process, and the Court upholds what has been done under the execution, no action can be brought in another Court to upset, on the ground of an irregularity, that which the Court itself, out of which the execution issued, has upheld. But in this country the Legislature appears to have thought it unsafe to leave the question as to whether there has been an irregularity in publishing or conducting a sale under an execution, to the final decision of the Court out of which the execution issued; and consequently an appeal was allowed from the decision of the Court. That was going one step beyond the ordinary course with reference to mere irregularities. Probably, the Legislature thought that there were already very considerable difficulties in an execution-creditor's obtaining the fruits of his judgment; that no very difficult point of law was likely to arise in deciding whether there was an irregularity in publishing or conducting a sale; and therefore that justice would be sufficiently protected by giving one regular appeal in such a case upon any question of fact or law. If the objection be allowed, the order made to set aside the sale is final; that, as I understand it, means final for all purposes. This would cause no great hardship: for if the objections were allowed, the only person likely to be affected by setting aside the sale would be the purchaser at the sale. But he could not be greatly injured; for when a sale is set aside, the purchaser is entitled by s. 258 to receive back his purchase-money with or without interest." S. 315 of the present Civil Procedure Code seems to me to point out

(1) 9 W. R., 218; S. C., B. L. R., F. B. R., 917.

the only remedy which it was intended to give to the auction-purchaser, that is, to recover the purchase-money with or with out interest. By s. 312 no suit will lie to set aside, on the ground of irregularity in publishing or conducting, a sale which has been confirmed under s. 312, and it seems unreasonable to suppose that it was intended that a suit should lie on the part of the auction-purchaser to confirm a sale which has been set aside on the ground of irregularity in publishing or conducting it. I would make the same order that I formerly proposed, for dismissing the suit with costs.

STRAIGHT, J.—I entirely concur in the views expressed by my honorable colleague Mr. Justice Pearson, and agree with him that this suit is properly maintainable. The appeal should be dismissed with costs.

Appeal dismissed.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

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EMPRESS OF INDIA *v.* ANAND SARUP AND OTHERS.

Transfer of Magistrate while trying a case—Jurisdiction to complete Trial.

Mr. *M* was appointed by the Local Government, under s. 37 of Act X of 1872, a Magistrate of the first class, under the designation of Joint Magistrate, in the district of Meerut. He was subsequently appointed to officiate as Magistrate of the district of Meerut during the absence of Mr. *F* or until further orders. While so officiating he was appointed by a Government Notification dated the 10th July, 1880, to officiate as Magistrate and Collector of Gorakhpur "on being relieved by Mr. *F*." He was relieved by Mr. *F* in the forenoon of the 23rd July, 1880; and in the afternoon of that day, under the verbal order of Mr. *F*, he proceeded to complete a criminal case which he had commenced to try while officiating as Magistrate of the district of Meerut. All the evidence in this case had been recorded, and it only remained to pass judgment. Mr. *M* accordingly passed judgment in this case, and sentenced the accused persons to various terms of imprisonment. *Held* (SPANKIE, J., dissenting) that Mr. *M* retained his jurisdiction in the district of Meerut so long as he stood appointed by the Government to that district and no longer, and the effect of the order of the 10th July, 1880, was to transfer him from the district of Meerut from the moment he was relieved by Mr. *F* of the office of Magistrate of that district, and from that moment he no longer stood appointed to that district and could exercise no jurisdiction therein as a Magistrate of the first class; and that therefore the convictions of such accused persons had been properly quashed on the ground that Mr. *M* had no jurisdiction.